Supreme Court, U.S.
FILED
MAY 24 1993
OFFICE OF THE CLERK

92-1912

No. _____

IN THE

Supreme Court of the United States

October Term, 1992

RACHEL TUCKER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PUBLISHER'S NOTE

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pg. 1

TABLE OF CONTENTS

Page

Question Presented for Review 1
Table of Authorities 3
Opinion Below 5
Jurisdiction 5
Statutes Involved 5
Statement of the Case 6
Reason for Granting the Writ 8

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS AND INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THIS COURT.

Conclusion 10
Appendix
Opinion of the Court of Appeals A1

TABLE OF AUTHORITIES

Cases:

United States v. Blackman,
950 F.2d 420 (7th Cir. 1991) 9
United States v. Diaz-Villafane,
784 F.2d 49 (1st Cir. 1989) 9
United States v. Lara,
905 F.2d 603 (2d Cir. 1990) 9
United States v. Summers,
893 F.2d 67 (4th Cir. 1990) 9
United States v. Tucker,
986 F.2d 27 (8th Cir. 1993) .....

Statutes:

18 U.S.C. §371 6
18 U.S.C. §3742(e) 5, 9
28 U.S.C. §1254(1) 5

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Rachel Tucker, petitions the Court for a Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals was rendered on February 24, 1993 and is reported as *United States v. Tucker*, 986 F.2d 278 (8th Cir. 1993). It is reprinted in the Appendix to this petition.

JURISDICTION

The Eighth Circuit Court of Appeals decided this case on February 24, 1993. The Petition for Certiorari is therefore timely.

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. §3742(e) provides in pertinent part:

. . . Upon review of the record, the court of appeals shall determine whether the sentence . . . was imposed as a result of an incorrect application of the sentencing guidelines. . . .

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

STATEMENT OF THE CASE

Petitioner, Rachel Tucker, was indicted by the grand jury of the Eastern District of Arkansas for violating 18 U.S.C. §371, conspiracy to possess with intent to distribute amphetamine.

On January 21, 1992, petitioner entered a plea of guilty to the charge.

On March 21, 1992, petitioner was sentenced. The sentencing guidelines provided for incarceration for 72 months. The district court departed downward from the guidelines on the theory that the petitioner had developed a victimized personality and her personal safety may be in jeopardy with incarceration. The petitioner was sentenced to five years probation with three years of home detention.

The district court articulated its reasons for the departure. The district court took into consideration the age, health, family history and prior victimization of the petitioner as well as the testimony of three psychologists. The court noted it had observed the petitioner over a period of time and had over 12 years experience in criminal matters on the federal bench.

The court determined that the total circumstances constituted mitigating factors not adequately considered by the Sentencing Commission. The United States appealed the district court judgment pursuant to 18 U.S.C.

§3742.

The Eighth Circuit Court of Appeals reversed the judgment. *United States v. Tucker*, 986 F.2d 278 (8th Cir. 1993).

The court of appeals determined that the sentencing judge had made conclusions of fact that were not justified by the evidence presented in the record.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS AND INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THIS COURT.

Petitioner was sentenced to five (5) years probation with three (3) years home confinement following a guilty plea to a charge of conspiracy to possess with intent to deliver amphetamine. Sentencing guidelines provided for a sentence of 72 months incarceration.

The sentencing judge departed downward because he concluded that petitioner had developed a victimized personality and her personal safety would be in jeopardy should she be incarcerated.

The sentencing judge made this fact finding after considering the following: 1) Testimony of three psychologists; 2) prior victimization of petitioner; 3) the age, health and family history of the petitioner; and 4) personal observation of petitioner over a period of time. The sentencing judge has handled criminal matters on the federal bench for twelve years.

The appeals court in this matter reversed the district court judgment. The appeals court did not conclude that the district court's finding was "clearly erroneous"

but rather made its own interpretation of the record.

18 U.S.C. §3742(e) provides, . . . The court of appeals . . . shall accept the findings of fact of the district court unless they are clearly erroneous. . . . Other circuits have interpreted this statutory language.

In *United States v. Blackman*, 950 F.2d 420 (7th Cir. 1991), the court noted at page 425, " . . . Furthermore, we have recognized that 18 U.S.C. §3742(e) requires courts of appeal to . . . accept the district court's findings of fact unless they are clearly erroneous. . . . " The court responded to the request to review the findings of fact. "Blackman is now asking us to second guess the district court after it has carefully weighed the same evidence that Blackman presents to us on appeal. This we will not do." *Blackman*, 950 F.2d at 426.

Courts of appeal should review the district court's factual determination under the clearly erroneous standard of 18 U.S.C. §3742(e) because the district court is in the best position to observe the demeanor and characteristics of the defendant. *United States v. Lara*, 905 F.2d 603 (2d Cir. 1990), *United States v. Summers*, 893 F.2d 67 (4th Cir. 1990), and *United States v. Diaz-Villafane*, 784 F.2d 49 (1st Cir. 1989).

In the instant case, the appeals court did not employ the standard that is required for review of the findings of fact by a district court. A review of a sterile paper record cannot replace the judgment of the district court

in its job of sentencing flesh-and-blood defendants.

CONCLUSION

The Eighth Circuit Court of Appeals applied the wrong standard of review in this matter. Its reversal of the district court should be vacated.

Respectfully submitted,

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May 24, 1993

APPENDIX

United States Court of Appeals

For the Eighth Circuit

No. 92-2419

United States of America,

Appellant,

v.

Rachel Tucker,

Appellee.

Appeal from the United States District Court
for the Eastern District of Arkansas

[Published]

Submitted: January 15, 1993

Filed: February 24, 1993

Before RICHARD S. ARNOLD, Chief Judge, MORRIS SHEPPARD ARNOLD, Circuit Judge, and JEAN C. HAMILTON,[1] District Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Defendant Rachel Tucker pleaded guilty to charges of possessing methamphetamine and conspiracy to possess with intent to distribute amphetamine and methamphetamine. Because of the large amounts of drugs involved, her sentencing guideline range was 155-188 months. Because of a statutory ceiling applicable to her case, however, she was legally eligible for only a six-year sentence. After extensive medical inquiries into

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[1]The Honorable Jean C. Hamilton, District Judge for the Eastern District of Missouri, sitting by designation.

Tucker's competency and mental state were performed, the trial court decided to depart from the guidelines and sentenced Tucker to three years of home detention. This appeal followed and we reverse.

I.

It is true that the federal sentencing guidelines are not entirely inflexible. Indeed, the statute creating the Sentencing Commission explicitly provides that a court may depart from an otherwise applicable guideline range if it "finds that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. §3553(b). The Commission, in turn, has itself noted that these kinds of circumstances "cannot, by their very nature, be comprehensively listed and analyzed in advance," but it goes on to identify "some of the factors that the Commission has not been able to take into account fully in formulating the guidelines." U.S.S.G. §5K2.0, policy statement. The list, the Commission admits, is not exhaustive. U.S.S.G. §1A4(b), policy statement. But where the Commission has listed a "factor" as having been taken into account, it cautions that "departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense." U.S.S.G. §5K2.0, policy statement. In other words, each guideline is to be regarded "as carving out a 'heartland,' a set of typical cases." U.S.S.G. §1A4(b), policy statement.

We have held that in determining whether a departure is maintainable, we will ask whether the circumstances relied on in departing may be legally relied on; whether as a matter of fact, the circumstance is present in the record; and, finally, whether the magnitude of the departure is reasonable. *United States v. Lang*, 898 F.2d 1378, 1379-80 (8th Cir. 1990). With these principles in mind, we turn to a consideration of their application to the case at hand.

II.

The district court at an initial sentencing proceeding announced that it was considering a sentence outside the range provided by the guidelines. The court noted that Dr. Edward Mahoney, a forensic psychologist, "reported that Ms. Tucker has suffered from a history of abuse" because she was "sexually abused as a child by both her father and her oldest brother." The court asserted, too, that she had been abused "by her first husband . . . until her husband left her and her two children." She was also, according to the court, "physically abused on the night of her honeymoon [by a third husband] and obtained an annulment shortly thereafter."

The court concluded from this personal history that Tucker was subject to being victimized and that her condition "may place her personal safety in jeopardy should she be placed in a detention facility." The court went on to recount that it had observed Tucker and believed that she had experienced stress because of her pro-

secution, and psychological injury because she had witnessed the associated prosecution and conviction of members of her family. The court noted also some physical ailments from which Tucker suffered that would probably require treatment. The court said that "the totality of these circumstances" warranted departure. But in summing up its concerns, the court alluded to Tucker's "vulnerability." "If she is incarcerated," the court opined, "I think she would be vulnerable due to the victimization . . . that she has been subjected to from a very early age." Appellee's appendix at 22-26.

At a later sentencing hearing, following another psychological examination, this one by Dr. Daryl Matthews, the court reviewed the concerns it had previously expressed, and added to the list the fact that Tucker was 67 years old. The court again placed emphasis on Tucker's "history of victimization" and reiterated that that history "may place her personal safety in jeopardy should she be incarcerated in a federal facility." *Id.* at 72-73.

We begin our consideration of this record by noting the difficulty that we have in fixing on the precise reason that the district court departed. Our first task on review, as we have said, is to determine whether that reason is one that the law allows. It is at least clear to us that the court thought that a number of the secondary facts found by it supported the general conclusion that Tucker was at some considerable risk of being victimized in a prison. (Though the court did not say so, we presume that it was led to this conclusion by the assumption that past abuse

may have so distorted Tucker's personality, and lowered her sense of self to such a degree, as to make it impossible or exceedingly difficult for her to defend herself or resist imposition.) We are not prepared to say that such a personality configuration is never possible, and we believe that the potential for victimization can provide a proper predicate for a departure. *See, e.g., United States v. Lara*, 905 F.2d 599, 602-603 (2d Cir. 1990).

But an examination of *Lara* is instructive. In that case, the trial court had information that " 'two tough male . . . inmates were attempting to coerce defendant by threats into becoming a male prostitute . . . for their economic gain and . . . enjoyment.' " *Id.* at 601. By contrast, in this case, the only testimony concerning the possibility of victimization came from Dr. Matthews, and it does not support the trial court's decision. Dr. Matthews testified that he had done some consulting with respect to Tucker's prospects for victimization, and he had spoken with one authority who believed that "individuals who were victimized in women's facilities tend to have dependent personality disorders and that it was rare for the victimization to occur outside of this particular psychiatric diagnosis." He also testified that the same authority advised that it was "rare for victimization to occur outside the context of homosexual relationships that develop within an incarcerated setting." He was told by one doctor that "elderly women tended to be treated . . . as 'grandmothers' and that they are treated with respect or care and that they tend not to be victimized" and by another that "homosexual victimization was unlikely in the event of

elderly women because they tend not to involve themselves in homosexual relationships, and this area of victimization doesn't usually occur in women's prisons among the elderly." Dr. Matthews, however, was unable to give an opinion as to the likelihood of Tucker being victimized, because he could not "determine reliably whether Mrs. Tucker has a dependent personality disorder . . . [since] the psychological testing is so unreliable that I've not been able to form a portrait, a personality portrait, of her." Therefore, he did not even reach the question of whether the medical opinions he had solicited were entitled to credence. Appellee's appendix at 48-49.

We have held that the "guidelines materials clearly indicate that departures 'were intended to be quite rare,' " *United States v. Neil*, 903 F.2d 564, 565 (8th Cir. 1990), quoting *United States v. Justice*, 877 F.2d 664, 666 (8th Cir. 1989), *cert. denied*, 493 U.S. 958 (1989), "and thus should be restricted to situations in which substantial atypicalities are found to exist." *United States v. Desormeaux*, 952 F.2d 182, 184 (8th Cir. 1991). We note no substantial atypicalities supported by the record here. To the extent that the testimony bears on the question of victimization, it seems to us to incline rather to the conclusion that there is no significant likelihood of it. In any case, the evidence lends insufficient support to the district court's conclusion.

The trial court also expressed concern about Tucker's age and health. But the guidelines specifically enjoin that these matters are "not ordinarily relevant" in

determining whether a sentence should be outside the applicable guideline range. U.S.S.G §5H1.1, §5H1.3, §5H1.4, policy statements. We discern nothing in this record that takes the defendant outside the perimeters of the ordinary case. We offer the same observation with respect to the district court's conclusion that the "totality of these circumstances" (chance of victimization, age, and health) somehow combine to transform this case outside the "heartland" that the guidelines establish.

III.

For the reasons indicated, we reverse the judgment below and remand the case for imposition of a sentence of 72 months incarceration.

A true copy.
Attest:
Clerk, U.S. Court of Appeals, Eighth Circuit.